Supreme Court of the United States

OCTOBER TERM, 1953

No. 117

FEDERAL COMMUNICATIONS COMMISSION,
Appellant,

vs.

AMERICAN BROADCASTING COMPANY, INC.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR AMERICAN BROADCASTING COMPANY, INC.

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BLEED THROUGH-

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OPINIONS BELOW

The opinion of Judge Leibell for the District Court (Judge Weinfeld concurring) and the dissenting opinion of Judge Clark have been reported at 110 F. Supp. 374 and 391 (R. 110 and 132). The Report and Order of the Federal Communications Commission (hereinafter referred to as "the Commission") adopting the Rules which are in issue in this case appear at 14 Fed. Reg. 5429 (R. 161).

JURISDICTION

The judgment of the court below was entered March 11, 1953 (R. 138). A petition for appeal was filed on May

8, 1953, and allowed on the same day (R. 140). The jurisdiction of this Court is invoked under 28 U. S. C. §§ 1253, 2101(b). On October 12, 1953, this Court noted probable jurisdiction and consolidated this case with Nos. 118 and 119 for argument (R. 307).

QUESTION PRESENTED

The Rules of the Commission that appellee attacked by its complaint (and to which we shall refer as "the Rules") are composed of two lettered paragraphs, (a) and (b), the latter having four numbered subdivisions. The District Court upheld Rules (a) and (b)(1) as a valid exercise of the Commission's rule-making power, but set aside and enjoined the enforcement of Rules (b)(2), (3) and (4). The question presented on the Commission's appeal is whether the District Court was right in holding that Rules (b)(2), (3) and (4) were not a valid exercise of the Commission's rule-making power.

STATUTES INVOLVED

The sections of the Communications Act* upon which the Commission relies for authority to adopt the Rules are set forth in Appendix A hereto. Section 1304 of the Criminal Code, 18 U. S. C. § 1304, which the Commission's Rules purport to interpret, is as follows:

> "§ 1304. *Broadcasting lottery information.*
>
> "Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such

*Throughout this brief we refer to the Communications Act of 1934, as amended, as "the Communications Act".

station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"Each day's broadcasting shall constitute a separate offense."

Section 326 of the Communications Act, upon which we rely as one of the bases on which Rules (b)(2), (3) and (4) must be held invalid, is as follows:

"§ 326—Censorship

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

STATEMENT

By notice dated August 5, 1948, and supplemental notice* dated August 27, 1948, the Commission announced that it was proposing to adopt certain rules governing the type of radio and television program popularly known as

*The supplemental notice corrected an error in the original notice, in the specification of the statutes on which the Commission was relying. The original notice included § 316 of the Communications Act, which Congress had repealed on June 25, 1948, at the same time enacting a similar statute, slightly modified in wording, as § 1304 of the Criminal Code (cited and quoted above in the text).

"telephone give-aways", "give-away contests", "give-away programs" or merely "give-aways."

Pursuant to the above notices, this appellee and others filed briefs in opposition to the proposed rules and participated in oral argument at a hearing before the Commission on October 19, 1948. The Commission did not present any argument in support of the proposed rules at the hearing. Nor did it have before it any evidence that programs coming within the terms of the proposed rules adversely affected the public interest (R. 3-4).

On August 18, 1949, the Commission, acting by four of its seven members, and with one (Commissioner Hennock) dissenting, issued a Report and Order promulgating and adopting the Rules, to be effective October 1, 1949.

THE COMMISSION'S RULES

The Rules as adopted by the Commission are as follows:

> "*Lotteries and Give-Away Programs*—(a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting 'the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.' (See U. S. C. § 1304).
>
> "(b) The determination whether a particular program comes within the provisions of subsection

(a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

"(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

"(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

"(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

"(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed

> phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question."

On August 31, 1949, appellee filed its complaint in this action. On September 19, 1949, Judge Rifkind convened a statutory court, and on September 23, 1949, after argument on a motion for a temporary restraining order, Judge Rifkind issued a restraining order and set down the application for an interlocutory injunction for hearing before the three-judge court at a later date. That application, however, did not come on for hearing because, following Judge Rifkind's issuance of a temporary restraining order, the Commission on its own motion postponed the effective date of its proposed rules until 30 days after final decision in this and the co-pending actions.

Following a number of discussions between counsel for the Commission and counsel for plaintiffs in the several actions, it was agreed that the cases could be and should be presented to the court in a form not requiring a decision on questions of fact. For that purpose, an amended complaint was prepared in this action, to exclude all allegations that the defendants were not prepared to admit; and the amended complaint was filed on September 22, 1952.* On the same day the plaintiff moved on the amended complaint, a supporting affidavit and a stipulation with defendants' attorneys, for summary judgment, and defendants filed a cross-motion for an order dismissing the complaint or, in the alternative, for summary judgment.

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*The records of the three cases before the District Court have been consolidated into a single record in this Court and, pursuant to stipulation (R. 1), the Commission and each of the appellees is entitled to rely in all three cases on facts set forth in the complaints and affidavits in any of them.

DECISION OF THE DISTRICT COURT

The decision below may be summarized as follows:

(a) The Court held that the Commission had power to announce in advance by rule that it would refuse to grant or renew licenses to broadcasting stations which proposed to follow or to continue to follow a policy of broadcasting programs that violate § 1304.

(b) It held that one of the tests laid down by the Commission for determining whether particular programs would violate § 1304—the test laid down in Rule (b)(1)—was in accordance with § 1304, and that that Rule was a valid exercise of the Commission's power.

(c) It held, Judge Clark dissenting, that the other three tests laid down by the Commission for determining whether particular programs would violate § 1304—the tests laid down in Rules (b)(2), (3) and (4)—were not in accordance with § 1304, and that those Rules were beyond the scope of the Commission's power. It reached that result by finding that, in the cases covered by those subdivisions, the element of "consideration", in the sense of the lottery statutes, was not present.

The District Court held that Rules (b)(2), (3) and (4) were in violation of the First Amendment, because based upon an erroneous construction of the law, but that Rules (a) and (b)(1) were not, and further that § 326 of the Communications Act, prohibiting the censorship of radio programs, did not bar the Commission from making rules designed to prevent the broadcasting of lotteries.

The court decided against appellee on the constitutional issues raised by paragraph 18 of the complaint (R. 7) and

on several issues raised by paragraph 16 (R. 6-7), relating principally to the requirements of the Administrative Procedure Act and the power of the Commission to add sanctions of its own to those established by Congress for violations of § 1304.

Under the allegation of paragraph 16 (d) that the Rules were based upon an incorrect interpretation of § 1304, we argued below that the Commission erroneously interpreted not only the requirement of "consideration" but also the requirement of "chance" under the lottery statutes, since under the cases it is established that the chance that is an essential of a lottery is chance in the *awarding* of the prize, and not chance in the selection of the participants.*

In the telephone give-away contests, the prize goes to the person, among the participants who are called on the telephone, who makes the correct identification or gives whatever else may be the correct answer. The award of the prize is a matter of skill, though the participants have been selected by chance. But the court pointed out that, in the programs that were before it, consolation prizes were given to all contestants, and said that "chance" was therefore present to a sufficient degree to satisfy the requirement of a lottery. In other words, the chance that selects a participant automatically results in the award to him of a consolation prize; and in that sense chance deter-

*An illustration would be a spelling bee designed to test average students—where the contestant from each school was chosen by lot, the prize obtained by money contributions from the several schools, and the prize awarded to the speller who lasted until all others had gone down. Under the decided cases, though "prize" and "consideration" (money contributions to the prize) were found to be present, there would not be a lottery because the winner was not determined by "chance" but by skill. *People* v. *Mail & Express Co.*, 179 N. Y. Supp. 640, *aff'd*, 192 App. Div. 903, *aff'd*, 231 N. Y. 586, is a leading case on the point.

mines the award of *some* of the prizes, though not the final and important prize.

As the record does not contain any examples of contests where consolation prizes are not given, we do not ask this Court to pass on the question of "chance" which we raised below. We merely note, for what bearing it may have on the arguments against the validity of Rules (b)(2), (3) and (4) under our Points II and III, that, if the words in Rule (b) are read literally, the Commission is proposing a test that might make Rule (b) applicable to a great variety of situations, such as our "spelling bee" illustration in the footnote, to which the lottery statutes were never intended to apply.

TYPE OF PROGRAMS AFFECTED BY THE RULES

The programs involved in this case are of the kind where a prize is given for the correct solution or answer. When, as is often the case, the prize is awarded for an identification, the subject may be a living person, an historical character, a book, a musical composition or any other identifiable thing. In the two programs that were put before the Court below by appellee as typical—"Stop the Music" (radio program) and "Stop the Music" (TV program), the subject for identification is a tune called the "mystery melody".* Contestants are selected from telephone directories by a random process, and when called on the telephone a contestant must qualify by first identifying a popular melody. If he does that, then the mystery melody is played for him, and if he can identify it he is the winner. Prizes accumulate from week to week until somebody wins.

*Neither of the "Stop the Music" programs is "on the air" at the present time.

Descriptions of the two programs are set forth at R. 8-10, and written transcriptions of a typical example of each of them are set forth at R. 63-89.

SCOPE OF LEGAL ISSUES BEFORE THIS COURT

The effect of the decision of the District Court was to declare lawful all appellee's give-away contests. Appellee did not appeal from the judgment sustaining Rules (a) and (b)(1) because it was not and is not broadcasting, has never to its knowledge broadcast, and has no intention of broadcasting in the future, any program falling within Rule (b)(1) or any program falling within Rule (a) after excluding from the application of that Rule the types of programs that fall within Rules (b)(2), (3) and (4).

We do, however, urge upon this Court (Points II and III) a number of arguments which, if we were entitled to appeal and had appealed from the judgment sustaining Rules (a) and (b)(1), could have been addressed to the validity of those Rules as well.

TERMINOLOGY

18 U. S. C. § 1304 refers to "lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance"; but, while the term "gift enterprise" has a fairly well understood meaning, and the courts have sometimes referred to schemes of chance as "similar to lotteries" (see *Boasberg* v. *United States*, 60 F. 2d 185, 186, *cert. denied* 287 U. S. 664), the tests which are applied to all such schemes—"prize", "chance" and "price" (or "consideration")—are the same, and the courts almost universally treat gift enterprises and similar schemes as categories of lotteries.

We shall therefore employ the word "lottery" as the equivalent of the statutory words "lottery, gift enterprise, or similar scheme". The suggestion of the Commission in its Brief (p. 15) that give-away contests can be brought under the statute as "similar schemes", if they are not "lotteries", is so wholly without support of authority that it does not require an answer.

Give-away contests are broadcast on television as well as on the aural radio; but to avoid such lengthy expressions as "listening to the radio or viewing the picture on television", we shall confine our references to radio, merely noting here that they apply equally to television.

SUMMARY OF ARGUMENT

Point I—The Commission's Rules (b)(2), (3) and (4) are invalid, because based upon a misinterpretation of Section 1304 of the Criminal Code.

Point II—Rules (b)(2), (3) and (4) are in violation of Sections 307(a) and 309(a) of the Communications Act, which require the Commission to grant or withhold station licenses solely according to the public interest, convenience and necessity.

Point III—Rules (b)(2), (3) and (4) are invalid as imposing censorship on broadcasting stations, contrary to the First Amendment and contrary to Section 326 of the Communications Act.

Point IV—Failure of appellee to appeal from the judgment sustaining Rules (a) and (b)(1) does not preclude it from raising the arguments set forth under Points II and III.

ARGUMENT

POINT I.

THE COMMISSION'S RULES (b)(2), (3) AND (4) ARE INVALID, BECAUSE BASED UPON A MISINTERPRETATION OF SECTION 1304 OF THE CRIMINAL CODE.

A detailed discussion of the Commission's Rules (b)(2), (3) and (4) is not necessary, because the Commission has clearly stated their purpose, saying that they "delineate those schemes which directly or indirectly require the audience to listen to, or view, the program as a condition of being eligible to win a prize" (Com. Br. 24). Subdivision (2) covers the case where listening to the radio is a requirement of the contest. Subdivisions (3) and (4) are cases where, according to the Commission's view, the program is so set up as to make it likely, and perhaps almost certain, that those who desire to win the prize will listen to the radio for help to that end.

The Commission's thesis seems to be that listening to the radio is an act, the doing of which is procured by the advertiser for the purpose of attracting a larger radio audience; that as the act is a "detriment to the promisee", and results in a "benefit to the promisor", consideration in the contract sense is present; and that the presence of that "consideration", accompanied by an award of prizes "in part by lot or chance", brings give-away contests under § 1304 of the Criminal Code.

We do not know of any case that has passed on the question of whether consideration in the contract sense is present in give-away contests, or at least in some of them. But where the advertiser has offered a prize for a correct

identification or other answer, and the winner has found out the answer and given it over the telephone, and as part of the program he has been identified and his answer repeated to the listening public, it seems that the advertiser has got what he bargained for and that, should he fail to deliver the prize, he would be liable to the winner for a breach of contract. In any event we assume that in such a case consideration in the contract sense is present.*

But the fact that the winner may claim the prize as a matter of contract is not determinative of whether the participants in the contest have furnished consideration in the sense required by the lottery cases. For the overwhelming weight of authority under the lottery laws in this country and in England establishes that the element of consideration in a lottery means something staked—some actual price in money or its equivalent that is paid for the chance for a prize. Even Judge Clark, dissenting below, made his bow to the decided cases when, discussing the question of consideration, he conceded (R. 135) that "The applicable test is not any strict doctrine of yielding a symbolic peppercorn to formalize a contract or a conveyance".

The Commission asks this Court to supplant a long-established rule of law by one that makes the test of a lottery—not whether the participants gamble their money by paying a price for a chance—but whether the promoter of the scheme derives a benefit from acts of a sort never yet held to be a form of gambling—specifically the act of following a prize contest on the radio or listening to the radio for clues to the winning answer.

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*_Maughs_ v. _Porter_, 157 Va. 415, 161 S. E. 242 (discussed _infra_) appears to us to have been decided correctly on the issue of contract consideration.

In his dissenting opinion Judge Clark, after stating his view of the purpose of the lottery statutes and the evils at which they are aimed, formulated the premise on which the Commission mainly rests its argument, as follows (110 F. Supp. at 392; R. 133-34):

> "There is also quite specifically the unjust enrichment which accrues to the manipulators of the scheme.* But it is still possible for anyone—advertiser, broadcaster, or what not—to make pure gifts; the Commission calls attention to the plot of a moving picture of twenty years ago, 'If I had A Million,' and says that if 'a rich man gives away his millions to persons chosen at random, it may be conceded that no evil would be done and no violation of the law would be involved.' *So what we are looking for is really some gain to the promoters of the scheme which takes the matter out of the realm of pure altruism."***

Following Judge Clark's lead, the Commission has formulated an entirely novel test of a lottery (Br. p. 22):

> "The essence of a lottery lies in the profit reaped by its promoter from the exploitation of the cupidity of the participants which leads the latter to take action beneficial to the promoter."***

Thus the Commission, by devising a formula, reads out of the cases practically everything they have said about the

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*If a watchband manufacturer sponsors a contest in which prizes are awarded for correct identifications of musical selections ("Stop the Music"), and he sells more watchbands because his name and product have become known to a large audience attracted by the program, it is not clear to us how a court can find *a priori* that his enrichment is "unjust" or that he is a "manipulator".

**Emphasis in all quotations in this brief is ours.

***Compare the definition in the leading case of *Commonwealth* v. *Wall*, 295 Mass. 70, 3 N. E. 2d 28, 29, that "the essence of a lottery is a chance for a prize for a price."

evil at which lottery statutes are aimed, which is *gambling* by the participants. No trace of the Commission's formula can be found in previous decisions of the courts. It is a tendentious premise, concocted to support a pre-determined conclusion.

Nor do the judicial decisions on lotteries give support to Judge Clark's distinction—which is the Commission's distinction also—between the "pure gift" and the case of gain to the promoters. Courts have not had to deal with cases like that of the imaginary rich man in "If I had a Million", who gave away his money at random. The "pure gift" case does not come up in real life. The cases with which the courts have dealt have involved prizes given away for business reasons—to advertise mercantile establishments or merchandise, to attract potential buyers to stores, to stimulate attendance at motion picture shows or auctions, or in some other way to derive an ultimate benefit—or hoped for benefit—that would more than make up for the cost of the prize.

When cases of that sort have come up for decision, the courts have not made a "search for an ultimate financial benefit to the promoter" (Com. Br. 51). What they have searched for has been a price paid by the participants in the drawing; and the question of lottery or no lottery has turned on whether participants paid for their chances. If they did not, then according to the great weight of authority the fact that the prize givers may derive good will from their bounty, or get business from the advertising that the contest creates, does not make the contest a lottery.

The Commission misconstrues the references in the cases to the profits of the promoter. Where the question before a court is whether participants in fact have paid a price for their chances, the promoter's profits are cited

only to prove that in fact they have. In the Bank Night cases, for example, the profits of the promoter (or, more accurately, the increased box office receipts on Bank Nights) are cited—not because the promoter's profits are significant in themselves, but because they tend to show that many of the persons attending the theatre on Bank Night have paid their money to get in on the drawing, rather than to see the picture.*

Profits of the promoter are cited also in connection with the doctrine that a lottery exists only when the participants contribute to a fund out of which the prizes are paid. The Commission criticizes *Garden City Chamber of Commerce* v. *Wagner*, 100 F. Supp. 769 (E. D. N. Y. 1951), 192 F. 2d 240, 104 F. Supp. 235, as having "adopted a principle not advocated by the majority below or any of the appellees, *i.e.*, that lottery consideration consists of a 'contribution in kind to the fund or property to be distributed.' "

The Commission is in error about what appellee advocates, because we certainly do advocate the principle that there is no lottery unless the participants or some of them, or others on their behalf, pay money or its equivalent into a fund which pays for the prizes. That principle is inherent in the doctrine of "price", and is in fact only another way of stating the requirement of price. Obviously if there is a price paid by the contestants to the promoter, the prizes come out of the price. If the prizes do not come out of contributions by the participants, or someone on their behalf, then no price has been paid and there is no lottery.** The

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**Grimes* v. *State*, 235 Ala. 192, 178 So. 73, 74; *Commonwealth* v. *McLaughlin*, 307 Mass. 230, 29 N. E. 2d 821, 822; *Commonwealth* v. *Lund*, 142 Pa. Super. 208, 15 A. 2d 839, 846.

***Of course, a scheme is not any less a lottery if the promoter guesses wrong and does not collect enough to cover the prize. See *State* v. *Schubert Theatre Players Co.*, 203 Minn. 366, 281 N. W. 369, 370.

expression of "price" in terms of contributions by participants to the fund out of which the money is paid is found particularly in the English cases. In XV Halsbury's *Laws of England* (2d ed.) 525, it is said:

> "But though this gambling element does not appear ever to be wholly absent, yet it need not be common to all the adventurers; it is enough that some of them stand to lose. Therefore, if some of the adventurers have, however indirectly, *contributed to the fund out of which prizes are to be paid,* they risk the amount of their contributions, and in such a case it is immaterial that others who have contributed nothing may win the prize."

CROSS* v. *THE PEOPLE

When a shoe merchant raffled off a piano—having given chances not only to his customers but to all others who asked for them and all who, living at a distance, sent in post cards, it was held that he was not conducting a lottery; that participation was free, so that the element of consideration was not present; and that the benefit the merchant may have derived or hoped to derive from the scheme as an advertising vehicle was an irrelevant matter under the lottery statute. *Cross* v. *The People,* 18 Colo. 321, 32 Pac. 821. In accord are: *Post Publishing Co.* v. *Murray,* 230 Fed. 773 (1st Cir. 1916), *cert. denied,* 241 U. S. 675 (1916); *Garden City Chamber of Commerce* v. *Wagner, supra; People* v. *Mail & Express Co.,* 179 N. Y. Supp. 640, *aff'd* 192 App. Div. 903, *aff'd,* 231 N. Y. 586; *State* v. *Big Chief Corporation,* 64 R. I. 448, 13 A. 2d 236 (1940); *Yellow-Stone Kit* v. *State,* 88 Ala. 196, 7 So. 338 (1890); *Brice* v. *State,* 242 S. W. 2d 433 (Tex. Crim. App. 1951); *People* v. *Burns,* 304 N. Y. 380 (1952).

The *Cross* case contains an excellent summary of the doctrine of consideration in the law of lotteries as it had been laid down in the leading cases in this country, as follows (32 Pac. at 822):

> "It may be accepted as the result of the adjudicated cases that a valuable consideration must be paid, directly or indirectly, for a chance to draw a prize by lot, to bring the transaction within the class of lotteries or gift enterprises that the law prohibits as criminal.* The gratuitous distribution of property by lot or chance, if not resorted to as a device to evade the law, and no consideration is derived directly or indirectly from the party receiving the chance, does not constitute the offense. In such case the party receiving the chance *is not induced to hazard money* with the hope of obtaining a larger value, *or to part with his money at all;* and the spirit of gambling is in no way cultivated or stimulated, *which is the essential evil of lotteries,* and which our statute is enacted to prevent. . . . The fact that such cards or chances were given away to induce persons to visit their store with the expectation that they might purchase goods, and thereby increase their trade, is a benefit too remote to constitute a consideration for the chances. Persons holding these cards, although not present, were, equally with those visiting their store, entitled to draw the prize. The element of gambling that is

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*Citing *Buckalew* v. *State*, 62 Ala. 334; *State* v. *Bryant*, 74 N. C. 207; *Com.* v. *Wright*, 137 Mass. 250, 50 Amer. Rep. 306; *State* v. *Clarke*, 33 N. H. 329, 66 Amer. Dec. 725; *State* v. *Shorts*, 32 N. J. L. 398, 90 Amer. Dec. 668; *Wilkinson* v. *Gill*, 74 N. Y. 63, 30 Amer. Rep. 264; *Governors* v. *Art Union*, 7 N. Y. 228; *State* v. *Mumford*, 73 Mo. 647; *Hull* v. *Ruggles*, 56 N. Y. 424; *Thomas* v. *People*, 59 Ill. 160; *U. S.* v. *Olney*, 1 Deady 461, Fed. Cas. No. 15,918; *Yellow-Stone Kit* v. *State, supra.*

> necessary to constitute this a lottery within the purview of the statute, *to wit, the paying of money,* directly or indirectly, for the chance of drawing the piano, is lacking, and the transaction did not constitute a violation of the statute."

Cross v. *The People* is a leading case on consideration in lotteries, and it represents the great weight of authority to this day. It was decided under a statute (Colo. Gen. Stat. § 2196) that was in form like 18 U. S. C. § 1304, in that it prohibited "any lottery or gift enterprise" but did not define the terms, and did not mention "consideration". Hence the *Cross* case bears on the argument of the dissenting judge (R. 133) and of the Commission (Br. 18, 47, 58-60) that § 1304 of the Criminal Code must be construed more broadly than those statutes, like the one in New York, that make reference to "valuable consideration" or some equivalent.* The thought seems to be that the federal statute leaves the courts with some discretion as to "the extent that consideration may be read into" the federal statutes (Com. Br. 18).

Of course, where a statute defines a lottery in terms of "valuable consideration" paid, or "money or valuable thing" hazarded, by the participants, it is not surprising that a court will refer to the statute as authority for that particular requirement of a lottery. But the decisions under the federal lottery statutes, the English Act, and the many anti-lottery provisions of State constitutions and statutes that merely condemn lotteries without defining the term, demonstrate beyond doubt that the requirement described by the

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*E.g., such terms as "for money or for anything of value" (Florida Stats. 1951, § 849.09) and "the hazarding of any money or valuable thing" (Georgia Code 1933, § 26-6502).

words "valuable consideration" is inherent in the concept of "lottery".

VALUABLE CONSIDERATION

It may be thought that "valuable consideration" is a confusing term, since "valuable" has significance, not in the law of contracts, but rather in the law of conveyances, where it is distinguished from good or meritorious consideration, such as love and affection. I Williston on Contracts (1936) § 110. But the cases show that legislatures and courts have used the qualification "valuable" to mark the distinction between consideration in contract law and consideration in lotteries; and once the requirement of "price" is expressed as "consideration", the qualification of "valuable" is a useful and understandable one. It signifies the doctrine that has been established by the great weight of authority, and which was expressed in *Commonwealth* v. *Wall, supra* (3 N. E. 2d at 29-30), as follows:

> ". . . the essence of a lottery is a chance for a prize for a price . . . 'Price' in this connection means something of value and not the formal or technical consideration which would be sufficient to support a contract."

The suggestion of the dissenting judge and the Commission that the courts have to "read into" the federal statutes the requirement of valuable consideration ignores the statutory history of lotteries. The first anti-lottery act in Anglo-American law was the Act for Suppressing Lotteries, passed in 1698 (10-11 Will. III, c. 17, ss. 1-3). It referred to "mischievous and unlawful games, called Lot-

teries" and declared them to be common and public nuisances. It did not define the term; but the English courts have always held that payment of a price by participants is an essential element of a lottery.

It is just as unreal to talk about "reading" the requirement of consideration into a statute dealing with "lotteries" as it would be to talk about reading the requirement of consideration into a statute governing contracts, price into a statute dealing with sales, delivery into a statute applying to gifts, or signature and attestation into a statute relating to wills.

The courts do not have to "read into" the lottery statutes the requirement of consideration. It is already there in the word "lottery". One of the Commission's own authorities, Williams, *Flexible Participation Lotteries** (1938), p. 104, puts the point quite plainly:

> "The English and federal forms are alike in that they do not mention consideration. However, this element is implied. *No court ever declared a game a lottery unless consideration was present.* In England it was so well known that any scheme or device for distributing prizes by chance was operated for a consideration, that the English didn't take the time to mention it in their definition."

The observation that the English do not even mention "consideration" in their definition of "lottery" is of interest.

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*According to its preface, Williams' book was prompted by the Bank Night controversy; and it deals largely with the Bank Night cases. It also contains interesting historical material and analyses of the State constitutional and statutory provisions relating to lotteries.

The English cases define a lottery merely as "a scheme for distributing prizes by lot or chance".* Nevertheless, every English case cited by the Commission and all others on the subject that we have read—where they have involved the presence or absence of what the American courts call "consideration"—have turned on the question of whether the participants paid a *price* for their chances for the prize.

One who reads the almost interminable discussions of the problem of consideration in some of the Bank Night cases cannot but be impressed by the clarity of the English decisions and the brevity of their opinions. The English courts have not got into trouble over the different meanings of "consideration" because they do not use the word in relation to lotteries. They use "price" or "payment" or some equivalent; and so they have avoided the "confusion" which the dissenting judge (R. 135) has found in the American decisions.

The Commission, on page 42 of its brief, cites Halsbury for a reference to "indirect consideration". Its quotation is taken from a footnote. The text on the same page, *op. cit.* at 526 contains the following statement:

> "But it seems that when the chances of a prize are obtained wholly gratuitously, and when, therefore, *none of the adventurers risks anything*, the scheme would not be a lottery." (citing *Willis* v. *Young* [1907] 1 K. B. 448, and *Barnes* v. *Strathern* [1929] S. C. (J) 41).

In *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685, 697, the Lord Chancellor, Lord Selborne, considered it so obvious that the lottery statutes had reference to

*Halsbury, *op. cit.*, p. 525.

gambling transactions only, that he disposed of the point in one brief sentence.

BROOKLYN DAILY EAGLE CASE

In support of its assertion that in lottery cases "the ultimate financial benefit to the promoter" is the decisive test, the Commission cites *Brooklyn Daily Eagle* v. *Voorhies,* 181 Fed. 579 (E. D. N. Y. 1910) and quotes from a passage in that opinion which, taken out of its context, might be read to support its argument. Read in the context of the facts before the Court the meaning is quite different.

The case involved an essay contest sponsored by a breakfast food manufacturer. Prizes were to be awarded for the "best" compositions, as determined by three impartial judges. The Postmaster barred from the mails all issues of the Brooklyn Daily Eagle containing the advertisement of the contest, on the ground that the standards were so vague that the prizes would be awarded by chance. The newspaper sought an injunction against the Postmaster, and the court granted it upon the ground that the contest was in reality one of skill.

The facts bearing on the question of consideration were that each contestant had to procure, and send in with his composition, three labels taken from packages of the sponsor's breakfast food. Thus the case is one which, if it were a radio contest, would fall within, or be closely akin to, those covered by the Commission's Rule (b)(1)—which is not in issue here—the case where the radio listener is required to be in possession of the sponsor's product in order to qualify for the prize.

While it is conceivable that some would-be essayist might go from door to door collecting empty cartons of the sponsor's breakfast food and thus obtain three labels without paying a price, obviously the normal way to get them is to buy three packages of the breakfast food; and in the lottery cases the courts assume that people will act normally, and they do not hold games of chance to be less than lotteries because there is a *possible way* of participating without paying. *Commonwealth* v. *Wall, supra.* Thus the bulk of the contestants in the breakfast food case could be assumed to have paid a price for their chances at the prize; and if the prizes had been awarded by lot, rather than on the merits of a composition, the scheme would clearly have been a lottery under the authorities.

So while the language of the court quoted on page 51 of the Commission's brief is somewhat loose—and the sentence "It is only necessary that the person entering the competition shall do something or give up some right" is too broad*—the meaning of the quotation as a whole is clear enough in the light of the facts of the case. Consideration did not have to be paid directly to the breakfast food manufacturer, but could be paid indirectly by purchase of his product in the stores. Acquisition of labels was sufficient, since it presupposed a purchase of the product. The manufacturer's sales having been increased because the contest stimulated people to buy his product, "based on a desire to get something for nothing", a part of the consideration *paid* by the contestants *went* into the coffers of the manufacturer who provided the prizes. The case does not help the Commission.

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*The sentence, in addition to being too broad, is also quite irrelevant to the Commission's argument that profits to the promoter are the test of a lottery.

In its Appendix B the Commission lists "decisions holding bank night and kindred schemes illegal"; and it places reliance on what it calls "the majority Bank Night cases"—as if they supported its position before this Court. Actually, except for a small number of cases where the courts have accepted the "detriment to the promisee" and "benefit to the promisor" meaning of consideration as applicable to lotteries, all the cases in Appendix B are contrary to the Commission's argument, because they were decided on the premise that *valuable consideration* is necessary for a lottery.

BANK NIGHT CASES

A detailed discussion of the Bank Night cases would lengthen this brief unduly; but the Bank Night cases are so numerous, and in some respects so confusing, that an analysis of the Bank Night decisions on a broad basis may perhaps be helpful.

Bank Night was a promotional scheme for motion picture theatres. The courts divided as to its legality under the lottery statutes. Some of the cases were criminal prosecutions, in which the rule of strict construction was applicable, while others were civil cases,* which came up in a number of different ways (suits by the proprietor of Bank Night to recover royalties from "licensed" theatres, or to enjoin unlicensed ones from using the plan,** suits by com-

*Summing up the authorities as they existed in 1937, the Supreme Court of Minnesota said that in civil proceedings the courts had generally held Bank Nights illegal, but that in criminal proceedings the weight of authority was that they were not lotteries, because the requirement of consideration paid by the participants was missing. See *State* v. *Stern*, 201 Minn. 139, 275 N. W. 626, 628.

**In one such case, *Affiliated Enterprises* v. *Gantz* (10th Cir. 1936), 86 F. 2d 597, the court denied injunctive relief on the "clean hands" doctrine, holding that if the Bank Night scheme was not actually a lottery it was too closely akin to it to have the protection of a court of equity.

petitors and public authorities to enjoin the scheme as illegal, etc.). The judges who wrote the numerous opinions, majority and dissenting, revealed differing degrees of tolerance toward promotional schemes of chance. Finally, the facts on which the issue of consideration turned varied from case to case, in greater or less degree, because the plan was changed somewhat during its history and—which is more important—individual theatre operators did not adhere strictly to its terms but made changes to suit themselves—usually in a way that increased the chance of its being held to be a lottery.*

The most thorough analysis of the Bank Night scheme—as it was supposed to operate, and as it actually operated—is contained in a report entitled "Memorandum for the Postmaster General embodying a finding of fact and recommending the issue of a fraud order" submitted to the Postmaster General by Honorable Paul A. Crowley, Solicitor of the Post Office Department, in a departmental proceeding against Affiliated Enterprises, Inc., promoter of the Bank Night plan. We base our description of Bank Night on that report.**

According to testimony reviewed by Mr. Crowley in his memorandum, Bank Night was "invented" to circumvent a

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*See page 24 *et seq.* of the Post Office Memorandum, referred to in the next footnote.

**For brevity we shall refer to Mr. Crowley's report as "the Post Office Memorandum". Pursuant to Mr. Crowley's recommendations, an order was issued on February 14, 1936, barring Bank Night from the mails as a lottery. The order is annexed to the Post Office Memorandum. The full title of the proceeding is "In the Matter of charges that Affiliated Enterprises, Inc., at Denver, Colorado, is engaged in conducting a scheme for the distribution of prizes by lot or chance in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), and of 18 U. S. Code 336."

provision of the NRA Motion Picture Code that prohibited theatres from giving away prizes. The inventor was advised by counsel that the provision would not apply if anybody who wanted to do so could participate in the prize drawing, without having to buy a ticket of admission to the theatre. According to the plan, a "licensed" theatre held a "Bank Night" once a week, on the evening (usually Wednesday) when experience showed attendance to be poorest. The participants in the drawing were all the persons above a minimum age who had gone to the lobby of the theatre and signed their names in a registration book, each one getting a number. Once a person did that, his number was in the drawing on all subsequent Bank Nights.

The drawing was held in the theatre at or about an appointed time on Bank Night, but it was not necessary for the holder of the winning number to be in the audience. He could be in the lobby, outside on the street, or anywhere nearby. His name was announced outside as well as inside the theatre. But it was a requirement that he be inside the theatre to claim the prize within a specified time, which was fixed by the particular theatre and varied from one to five minutes. If the winner was outside the theatre when his name was called, he could enter free, to claim his prize. If the winner did not claim the prize within the specified time, it was added to the prize for the next Bank Night.

Briefly, the argument against Bank Night was that its necessary effect, because of the way the plan worked out in practice, was to induce persons interested in the drawing of the prize to lay out money for tickets of admission to the theatre. The point was stated in *Commonwealth* v. *Wall, supra,* (3 N. E. 2d at 30) as follows:

"So here the test is not whether it was possible to win without paying for admission to the theatre. The test is whether that group who did pay for admission were paying in part for the chance of a prize. The jury could disregard all evidence introduced by the defendant favorable to him. They could take a realistic view of the situation. They were not obliged to believe that all the ingenious devices designed to legalize this particular game of chance were fully effective in practical operation. An important feature of the plan was the necessity that the person whose number was drawn should appear at once and claim the deposit. The time allowed for appearance was entirely within the control of the defendant. No definite time seems to have been fixed. A participant inside the theatre would have the advantage of immediate presence in a place of comfort. He could hear the number and the name read. He could identify himself at once. A participant outside the theatre must wait in discomfort in the hope that if his name should be drawn within he would be notified and would hear the call soon enough to crowd through toward the front of the theatre within such time as might be allowed. The object of the defendant was to fill the theatre, not the lobby or the sidewalk. We think the jury could find that the unusual crowds which completely filled the theatre on 'Bank Night' paid to come in partly because they had, or reasonably believed they had, a better chance to win the prize than if they had stayed outside, that they paid their money in part for that better chance, and that the scheme in actual operation was a lottery. There was no error in denying the defendant's motion for a directed verdict."

To the above description of the factors that induced would-be participants in Bank Night to lay out money for

admission to the theatre, the Post Office Memorandum, pp. 38-39, adds the following:

> "The opportunity to actually see how the drawing is conducted and gauge at first hand whether it is fairly done, the thrill of hearing touching and amusing recitals as to how the lucky winner will use the prize money, is denied the persons who have convinced themselves that there is 'something for nothing', and remain outside."

In most, if not all, of the cases which condemned Bank Night as a lottery, it was found as a matter of fact that many people did lay out money for a ticket to the theatre, not because they wanted to see the play but because they wanted to participate in the drawing of the prize; and the holdings of the cases were that the possibility of free participation did not remove the case from the lottery category. The fact that free tickets are given to some participants does not make the price paid by others any less a price for a chance at the prize. *Glover* v. *Malloska,* 238 Mich. 216, 213 N. W. 107 (1927).

Of the various positions that the courts have taken on the subject of Bank Night, that which is represented by the Massachusetts decisions appears to be the most sensible, and certainly the one most consistent with the authorities. It is, in substance, that whether a Bank Night scheme is a lottery, or a game with free participation, depends on how the scheme is operated, and that that question in a criminal case is for the jury. As the court said in *Commonwealth* v. *Heffner,* 304 Mass. 521, 24 N. E. 2d 508, 509:

> "Perhaps it would be more convenient for law enforcement officers and for such proprietors of

> theatres as care to use this kind of advertising if we could issue a pronouncement either that 'Bank Night' is a lottery or that it is not a lottery. But there is no peculiar law applicable to 'Bank Night' under which we can make a ruling of that kind. Each instance must be judged by the general principles of law relating to lotteries as applied to the facts which could be found upon the evidence and the permissible inferences from those facts. The facts and permissible inferences vary with time, method, and the physical arrangement of the premises. We can no more say that it can never be possible to operate the plan called 'Bank Night' so as wholly *to remove the element of price paid for a chance from the admission fee* charged those who enter than we can say that as a matter of law the plan is always free from that taint. It seems likely that the decision will commonly, though not always, rest in the domain of fact."

Since it is unnecessary for us to rely on those Bank Night cases which held, on the evidence before the respective courts, that the scheme was not in violation of the lottery statutes, we pass them with a brief comment. All of them, of course, stand for the proposition that a valuable consideration is an essential of a lottery. Some of them may not be reconcilable with the cases holding Bank Night illegal; some of them are. See, *e.g.*, the comment in *Commonwealth* v. *Wall, supra* (3 N. E. 2d at 30) on the case of *State* v. *Eames,* 87 N. H. 477, 183 Atl. 590, to the effect that in the *Eames* case "free participation was a reality" on the agreed statement of facts before the court, and the further comment that much the same could be said of *State* v. *Hundling,* 220 Iowa 1369, 264 N. W. 608.

The cases upholding the Bank Night scheme* as lawful include some very respectable authority; and there is much that can be said on both sides of the question of whether it is a harmless form of advertising and entertainment or a pernicious gambling game. Not only courts but legislatures have viewed it as a legitimate advertising device.

SECOND THOUGHTS ON BANK NIGHT

The status of Bank Night in New Mexico is of interest. The Supreme Court of that State first upheld the plan as lawful in *City of Roswell* v. *Jones,* 41 N. M. 258, 67 P. 2d 286 (one judge dissenting). Later, in *State* v. *Jones,* 44 N. M. 623, 107 P. 2d 324, the *City of Roswell* case was overruled (two judges dissenting), on a reconsideration of the plan in the light of intervening decisions of other courts.

The dissenting judges pointed out that the history of lottery statutes in New Mexico was such that a liberal attitude on the subject was required, citing *Harriman Institute of Social Research* v. *Carrie Tingley C. C. Hospital,* 43 N. M. 1, 84 P. 2d 1088—a case in which, among other interesting observations, the court had remarked that lottery laws had to be interpreted "in the light of the local conditions, other existing laws *and the customs of the people,* in order to ascertain the intent of our legislature" (at 1094).

The intent of the New Mexico legislature was made manifest when it passed an amendment (Laws 1949, ch. 133), adding to the existing exemption for charitable raffles an exemption for motion picture theatres, and also

*Listed by the Commission in Appendix B of its Brief, pp. 74-75.

for county fairs offering prizes of livestock or poultry. The exemption in the present New Mexico statute (N. M. Stat. 41-2218) which applies to motion picture theatres is as follows:

> ". . . the provisions of the five preceding sections [the anti-lottery statutes] shall not apply to bona fide motion picture theaters which are, and for more than one [1] year have been, engaged in business at the same location in the state of New Mexico, and which shall offer prizes of cash or merchandise for advertising purposes in connection with such business, or for the purpose of stimulating business, whether or not any consideration, other than a monetary consideration in excess of the regular price of admission, is exacted for participation in such prizes or drawings, . . ."

Thus the New Mexico legislature not only declared Bank Night to be lawful, but it gave its sanction also to prize awards limited to those who attend the theatre, which had been condemned in some other States as gift enterprises. *E.g., State* v. *Danz,* 140 Wash. 546, 250 Pac. 37.

The legislature of Arkansas had previously passed a specific statute to legalize Bank Night and similar advertising schemes (Acts 1937, No. 238, § 1, p. 851; Stat. 1947, § 84-2209):

> *"Bank night or buck night—Certain kinds of advertising consisting of giving prizes made lawful.* —The method of business advertising now or hereafter to be conducted in this State by the giving away of prizes consisting of money or other thing of value, where no payment of money or other thing of value is required of participants in such awards, whether such advertising plan be entitled, "Bank Night,"

"Buck Nite," or any other name whatsoever is hereby declared to be a legal form of advertising."

Kentucky has a similar statutory exemption (Ky. Rev. Stat. 1943, § 436.360) applying broadly to mercantile establishments, theatres and newspapers:

> "(2) Subsection (1) of this section [the anti-lottery statute] shall not apply to any gift, money, property or anything of value which is awarded by lot or drawing by mercantile establishments, theatres or newspapers which make such awards to their customers, and which charge no price and collect no fee for the privilege of participating in such lot or drawing other than the regular price of merchandise sold, admission ticket or subscription price to all customers, whether or not they participate in the awarding."

Here again the legislature of the State has specifically legalized, not only prize drawings for which, as with Bank Night, free chances may be obtained, but also drawings that are limited to those who have paid a price for something—customers of the stores, patrons of the theatres and purchasers of the newspapers.

Montana has a similar exemption for the benefit of agricultural fairs and rodeo associations. (Mont. Rev. Code 1947, § 94-3002.)

Oklahoma has an exemption which permits resident merchants to issue, free of charge, numbered tickets on sales of merchandise and to award prizes by lot drawn by a representative of the Chamber of Commerce or commercial club of the city or town. (Okla. Stat. (1951) Title 21, § 1051.)

It is not only the legislatures that have had second thoughts on the subject of Bank Night, in its favor rather

than against it. The Supreme Court of Minnesota had condemned a Bank Night scheme as a lottery in *State* v. *Schubert Theatre Players Co.,* 203 Minn. 366, 281 N. W. 369. In 1950, after most of the other Bank Night cases had been decided, the problem came up again and the court, after full consideration of the authorities, held (two judges dissenting) that the Bank Night plan was not a violation of the Minnesota lottery statute. *Albert Lea Amusement Corp.* v. *Hanson,* 231 Minn. 401, 43 N. W. 2d 249.

The scheme in that case differed from the one outlined above in that, if a would-be participant called at the theatre during business hours on the day before the drawing or prior to 4 P. M. on the day of the drawing, he could obtain an "absentee card" which would entitle him to claim the prize at any time within 48 hours after the drawing. That distinction, however, does not appear to have been determinative. Whether it was or not, the court rejected the argument that anything less than payment of a price for a chance was consideration under the Minnesota lottery statute.

When Bank Night was taken out of the theatre and used to advertise a market, to which participants, without paying an admission fee, could go to register, then to qualify for the weekly drawing, and then to attend the drawing (as they had to do in order to win if their numbers were called), it was held not to be a lottery. *State* v. *Big Chief Corporation, supra.*

The Commission footnotes the *Big Chief Corporation* case in its Appendix B, calling it "A decision failing to determine the applicable legal test because of inadequate facts in the record". Nevertheless, the decision of the Supreme Court of Rhode Island is a square holding against the Commission's position on consideration.

The trial court on an agreed statement of facts, a jury trial having been waived, found that the scheme was a lottery because "many" persons attracted to the market by Bank Night were necessarily led "to make purchases; and that [their money thus spent] was spent not only for merchandise but for the purpose of participating in the bank night". The trial court applied what might be called the doctrine of "consideration by virtue of irresistible temptation".

The appellate court said it did not have to pass on the question of whether that doctrine was correct, because there was no evidence that many or even any of the participants had bought merchandise from the market because of their desire to participate in the drawings. The court then said (13 A. 2d at 242):

> "For that reason *and because the decision of the trial justice cannot be supported on any other line of reasoning which we consider sound,* the decision is erroneous."

The court, therefore, necessarily decided that the facts in the agreed statement did not amount to lottery consideration, to wit, that a participant was required (a) to go to the market to register, (b) to go to the market again during the week of the drawing to have his registration card "qualified", and (c) to attend the drawing in order to win the prize if his number came up.

The opinion does not leave room for doubt that such was the holding, because the court specifically said (13 A. 2d at 239):

> "It has been held in a few cases that the requirement of consideration is satisfied by any conduct

> which would constitute consideration for an executory contract. See, for instance, *Maughs* v. *Porter*, 157 Va. 415, 161 S. E. 242. *But this holding is against the very great weight of authority and we do not follow it* in the instant case."
>
> "On the contrary, we accept and apply the doctrine that the consideration, required as one of the necessary elements of a lottery within the meaning of that term as used in statutes forbidding lotteries, must be a consideration having a pecuniary value. *Commonwealth* v. *Wall*, 1936, Mass., 3 N. E. 2d 28."

The Bank Night cases do not help the Commission. Even those which went furthest in adopting without qualification the detriment and benefit theory—and the case that the Commission (Br. pp. 49-50) cites as "typical" in its reasoning perhaps went furthest of all—*Furst* v. *A. & G. Amusement Co.*, 128 N. J. L. 311, 25 A. 2d 892, 893—found consideration in the money paid by those who bought admission tickets to the theatre in order to be in on the drawing.

In so far as those cases either adopt or give lip service to the detriment and benefit theory, they not only are contrary to the great weight of authority but subserve a doctrine that is unsound and, from the standpoint of proper administration of the lottery statutes to accomplish their purpose, dangerous as well.

Moreover, there is nothing in the radio give-away contests that is comparable to paying an admission price to get into a theatre on Bank Night.

GIFT ENTERPRISE CASES

In a gift enterprise, a person buys something and gets with it, without additional consideration, a chance for a

prize. Many cases have held that, even though the buyer gets "full value" for what he buys, a part of the price must be attributed to the chance, and for that reason such a scheme is a lottery. Those cases have no application to the case at bar, since the person who follows a give-away contest on the radio, even if he is a winner, does not get his chance as a result of buying *anything*.

One of the leading gift enterprise cases is *Horner* v. *United States*, 147 U. S. 449, upon which the Commission bases a curious argument. It sets up a straw man issue, as to whether the risk of "loss", "impoverishment" and "pauperism" is "the sole evil of lotteries" (Com. Br. 37-41). It argues that there could not be any loss to buyers of the Austrian bonds which had lottery provisions in them, because they were payable at any event at the end of 55 years, and with interest. Therefore, it says, impoverishment cannot be the test, and therefore again—if we follow the argument—payment of a price in money or equivalent value is not a requirement of a lottery.

We cannot believe that the Commission will seriously maintain before this Court that nobody could lose money on an Austrian bond issued in 1864 and maturing 55 years later (in 1919 when, as it turned out, the Austrian Empire had ceased to exist)—a bond upon which no interest was payable until redemption, and then only an amount which at its maximum was equal to 5% per annum for 20 years—so that in effect no interest at all was payable for the last 35 years of the life of the bonds not previously redeemed. Nor can we believe that the Commission will seriously contend that people might not be induced to buy such bonds, when they could not afford to do so, because of the gamble that they carried with them. The prizes were very large;

the luckiest bondholder in each drawing would receive, for a bond of the face value of 100 gulden, the sum of 250,000 gulden, or 2500 times the face value.

Of course, the test of a lottery is not whether it will result in "impoverishment" of the participants, though "impoverishment" has been referred to in statutes, in the cases, and generally in the literature of lotteries, as a disaster that may come to those who gamble in lotteries.* The test is whether people are induced to lay out money for a bond or article of merchandise which they would not buy except for the chance at the prize.

The other gift enterprise cases** require no comment. They apply familiar principles which, regardless of their merits, have no application in this case.

There remain the three cases cited on page 51 of the Commission's brief, of which it says that they are "closely similar to the case at bar". They are *State ex rel. Regez* v. *Blumer,* 236 Wis. 129, 294 N. W. 491; *Knox Industries Corp.* v. *State ex rel. Scanland,* 258 P. 2d 910 (Okla. 1953); and *Maughs* v. *Porter, supra.*

Maughs v. *Porter* does not require comment, because it is dealt with at some length in the opinion of Judge Leibell in the District Court (110 F. Supp. at 386-87; R. 126-27) and we have nothing further to add. Judge Leibell pointed

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*The Act for Suppressing Lotteries, *supra,* recited that the promoters of lotteries had "most unjustly and fraudulently got to themselves great sums of money from the children and servants of several gentlemen, traders and merchants, and from other unwary persons, *to the utter ruin and impoverishment of many families".*

**For example, *Bell* v. *The State,* 37 Tenn. (5 Sneed) 507; *United States* v. *One Box of Tobacco,* 190 Fed. 731 (4th Cir. 1911); *Rountree* v. *Ingle,* 94 S. C. 231, 77 S. E. 931.

out that the case had been severely criticized and had not been followed by other courts.*

KNOX INDUSTRIES CORP. v. STATE

Knox Industries Corp. v. *State ex rel. Scanland, supra,* was decided on the authority of *State ex rel. Draper* v. *Lynch,* 192 Okla. 497, 137 P. 2d 949—a case involving Bank Night. The *Draper* case is an example of the baleful influence that is sometimes exercised on busy courts by text writers who are special pleaders and have developed superficially plausible theories. Williams, *Flexible Participation Lotteries, supra,* was directed at Bank Night. Not content with attacking the scheme on the basis which the Post Office Department found sufficient, as well as most of the courts which decided against Bank Night, Williams in his book argued for the broadest revision of the definition of consideration as laid down in the lottery cases. He urged that at least six types of consideration could be found in Bank Night, including (in addition to the time and trouble involved in registering at the theatre), subjecting oneself to the theatre's sales appeal, the furnishing to the theatre without cost, through registration, of a useful mailing list, and the rendering of services by the participants to the theatre in the form of advertising, arising from the fact that they would tell "kin, comrades and acquaintances" about the theatre's Bank Nights. Williams, *op. cit.,* p. 133.

The Oklahoma court accepted that analysis and made use of it in the *Draper* case; but the court went Williams one better, by finding seven forms of consideration to Williams' six. The additional element which the court

*18 Va. Law Rev. 465; 80 U. of Pa. Law Rev. 744; 45 Harvard Law Rev. 1206; *Darlington Theatres* v. *Coker,* 190 S. C. 282, 2 S. E. 2d 782, 788, and other cases cited by Judge Leibell.

found, relying on *Maughs* v. *Porter, supra,* was the benefit which the theatre operator derived from having the participants present in or near the theatre, over and above the monetary benefit derived from the admission prices received from the paying customers. That flight of fancy suggests the unlimited possibilities of the detriment and benefit analysis, as applied to advertising schemes involving prizes.

The *Knox Industries Corp.* case involved a free raffle of an automobile every 52 days by a company that operated a chain of automobile service stations. Tickets were given free to anybody who applied for one at any of the service stations. At every station there was a container in which the ticket stubs could be dropped before noon on the day of a drawing. The winning numbers were posted in each service station. To claim the prize, the winner had to appear in person at the main office of the defendant.

The Oklahoma Act (Okla. Stat. 1951, Title 21, § 1051) defined lottery in terms of "the disposal or distribution of property by chance among persons who have paid, or promised, or agreed to pay any *valuable consideration** for the chance . . ." The Oklahoma Supreme Court held the scheme to be a lottery, on the authority of the *Draper* case. It found consideration in the fact that participants had to go to the service stations of the defendant to get their tickets, to deposit the stubs in the container, and to ascertain the winning numbers, with the result that "all prospective participants are subjected to the sales appeal of the merchandise offered for sale at defendants' stores and stations"—the inference being that they could not resist the

*The case is further evidence of the fact that there is no correlation between the form of the State lottery statutes and the scope which the courts give to the meaning of "consideration."

temptation to buy things that otherwise they would not buy, and so in that manner there was what we have called consideration by virtue of irresistable temptation.

The *Knox Industries Corp.* case is perhaps the most extreme example of the doctrine that any detriment to the promisees and benefit to the promisor are sufficient to supply the requirement of consideration for a lottery. According to its reasoning, a lottery is present in any and every advertising scheme involving prizes, if it also involves trips by the participants to the advertiser's store. The decision is not only contrary to the great weight of authority, but it imposes a test that goes far beyond the community standards of right and wrong.

There are expressions in the opinions in cases under the lottery laws, which warn against the danger of too broad an interpretation of their prohibitions. The following wise observation was made by a New Jersey Court of Special Sessions in *State* v. *Horn*, 16 N. J. Misc. 319, 1 A. 2d 51, 53 (a Bank Night Case):

> "My own viewpoint is that there should be the strict construction indicated in State v. Hundling, supra; and this because first, criminal statutes should be strictly construed, and secondly and more fundamentally, because there is a problem involved in the construction of our gaming statutes, infinitely more important than the narrow judicial proposition embraced within the four corners of a single issue. This problem is one social in character, and should not be ignored from the standpoint of realism. Our statutes in their essential terminology and application, are such as to create a situation whereby the casual or intermittent offender is brought before the court upon what may be an extremely narrow issue and if the cause is adversely decided as to him,

> he is branded a criminal for the rest of his life, where there may be all around him violations apparently as obvious, going ignored.
>
> "I am not able to look with complacence on a statutory situation or the construction of such, which serves no purpose except to breed disrespect for the law in its apparent inequalities, and promotes no good social purpose looking toward the control of the vice of gaming."

The views of the New Jersey court were quoted with approval in the concurring opinion of the Chief Justice in *State* v. *Jones, supra* (107 P. 2d at 331-2).

STATE EX REL. REGEZ* v. *BLUMER

State ex rel. Regez v. *Blumer, supra,* deals with a preposterous advertising scheme of a druggist. He put up a dollar a day for each of two daily raffles, after canvassing the city and procuring the names of several thousand persons who were willing to be contestants. No price was charged, but every contestant had to make a trip to the drug store every day and pick up a "daily card", without which he could not win in the next day's raffles even if his number came up. When a winner was not eligible for lack of a daily card, whatever was in the pot was added to the stake for the next day.

According to the complaint, the allegations of which the court said had been admitted by the defendant's demurrer (294 N. W. at 492):

> ". . . the effect of the scheme is to get persons to go to the store and there purchase goods who would not have done so but for participation in the

> scheme, and that the increased patronage thereby procured supports the scheme. It is also alleged that the continued operation of the scheme 'tends to demoralize winners' and results in 'injury to the habits and morals of the people of Monroe and the surrounding country; * * *"

It might be supposed that a wise court would have allowed the people of Monroe and the surrounding country to have their little day of foolishness, secure in the knowledge that all such schemes die a natural death because the public get tired of them—and that, if in the meantime some of the participants had bought their toothpaste, cigarettes or Hershey bars at defendant's drug store, it was a matter of little consequence.

It might also be supposed that a wise court would not take too seriously the tendency to demoralization and impairment of habits or morals from the winning of a dollar, ten dollars or twenty-five dollars in a raffle, when it is common knowledge that there are few communities in the country where raffles of everything from electric toasters to automobiles do not occur—sometimes under very respectable auspices—of Police and Fire Departments, churches, schools and hospitals. Of interest in this connection is a passage from the opinion of the Supreme Court of New Mexico in *Harriman Institute of Social Research, Inc.* v. *Carrie Tingley Crippled Children's Hospital, supra* (84 P. 2d at 1094) quoting an opinion of the Attorney General of that State dealing with "suit clubs"—a scheme by which 25 young men who need a new suit band together, and from time to time put into a pot enough money to buy a suit for one of them, the winner being determined by lot. Saying

that he could not escape the conclusion that the scheme was a lottery,* the Attorney General added the following:

> "At the same time, bearing in mind the evil at which the legislation was aimed, it must be said that continuously, since the act was passed in 1889, there have been raffles, which are essentially lotteries, carried on in almost every town in the state without any interference from the authorities. Scarcely a week passes in any of our larger towns that there are not raffles of articles of property, for which chances are sold, and the winning party determined by lot. No attention has been paid to these infractions of the law, because public sentiment would not favor the enforcement of the statute against small schemes of this kind and, without the support of public sentiment, it is generally recognized that prosecutions under statutes of this class would be ineffectual."

The Wisconsin court in the *Regez* case, however, did not take into account any such practical matters, but chose to stretch its lottery statute to cover the druggist's raffles, holding that its decision in *State ex rel. Cowie* v. *La*

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*Here is a scheme which, by the time the last man has his new suit, has served as a savings plan for all the participants—just as truly a savings plan as the "Christmas Club" of a savings bank. To construe it as a lottery is to bring under the lottery laws something that is not within their mischief; and it could be excluded from the category of lottery by a reasonable definition of prize—*i.e.*, a holding that, because the plan calls for an award of a suit in due time to each member, there is not the unequal distribution of the "pot" that is sometimes referred to as a characteristic of a lottery, especially in the English cases. See XV Halsbury's *Laws of England*, p. 525 *et seq.*

We mention the point for the purpose of noting that the Commission has taken on a difficult judicial function—not only in deciding whether "consideration" and "chance" are present in an alleged lottery but also whether the element of "prize" is there also. We know of nothing in the Commission's record that would lead one to think that it has any special competence to decide such questions.

Crosse Theaters Co., 232 Wis. 153, 286 N. W. 707—a Bank Night case—was controlling, and saying (294 N. W. at 492):

> "The trial court was of the opinion that the facts of the registrants' going to the store each day to get the daily coupon and that the operation of the scheme paid the defendant or he would not operate it,* constitute a consideration. Consideration consists in a disadvantage to the one party or an advantage to the other. We here have both."

The consequences of the two Wisconsin decisions are of special interest in this case:

In 1950, the District Attorney of Milwaukee County applied to the Attorney General of Wisconsin for a ruling as to whether certain programs that were being broadcast by radio stations located in his county were in violation of the Wisconsin lottery statute. Most of the programs were of local origin, but one of them was appellee's TV network program "Stop the Music" (See R. 79-89). On the basis of the broad construction of "consideration" that the Wisconsin Supreme Court had adopted, the Attorney General ruled that the program in question did violate the statute. 39 O. A. G. (Wisc.) 374. In the course of his opinion he said, citing the above described Wisconsin cases, that:

> "It is not necessary that the consideration be monetary or even that it be valuable to the promoter of the lottery. * * *
>
> * * * * *
>
> "That this entire scheme ("Stop the Music"—TV) is a lottery within the principles heretofore

*The equally plausible alternative—that the druggist's method of advertising was idiotic, and very likely would do him more harm than good—seems not to have been considered.

stated in this opinion is too clear to require further comment."

Appellee retained attorneys in Wisconsin to take up the matter with the authorities and, if necessary, to file suit in the Federal court to enjoin the District Attorney from enforcing the statute as construed by the Attorney General.* The matter was brought to the attention of the Wisconsin legislature and a hearing before a legislative committee was held. A bill was then introduced in and passed by the Wisconsin legislature (Wisc. Laws 1951 ch. 436), amending the Wisconsin lottery statute (Wisc. Stat. § 348.01) by inserting the following specific exemption for give-away contests:

> "(2) In order for a radio or television show or program to be held in violation of this section it shall be necessary to show that consideration involves either the payment of money, or requires an expenditure of substantial effort or time. Mere technical contract consideration shall not be sufficient. Listening to a radio, or listening to and watching a television show shall not be deemed consideration given or received."

The amendments of various state statutes as outlined above are evidence that the courts which in the Bank Night cases followed the Williams analysis, and either held or said that *any* detriment to the promisee or benefit to the promisor was sufficient to establish consideration for a lottery, not only departed from principles that had governed the interpretation of lottery statutes in England and this country

*As this and the following statement are only introductory in nature, we have thought it not improper to make them on the basis of the personal knowledge of the attorney and counsel for appellee.

since 1688,* but formulated a test that was unsound and impracticable, because in effect it branded as illegal a great variety of games and advertising schemes that most people do not consider anti-social or vicious, or within the intent of the gambling laws.

FISHING CONTESTS

The ruling of the Post Office Department which resulted in the amendment of the Federal lottery statutes to add thereto 18 U. S. C. § 1305,** exempting fishing contests, is a ludicrous example of a tendency to apply the lottery statutes beyond their reasonable scope. The ruling was that a fishing contest, where there was an entry fee, was a lottery if the prizes were awarded for performance that must depend "largely"*** on chance, such as a prize for the largest fish caught, because "the actual size of the fish caught depends on chance." See 2 U. S. C. C. S., 81st Cong. 2nd Sess. 1950, pp. 3010-11, in which a Senate Committee, adopting the report of a House Committee, submitted to the Senate the bill which became 18 U. S. C. § 1305. The Committee treated the matter in a somewhat humorous vein,

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*That the Wisconsin legislature did not think that, in amending its statute, it was doing more than confining "lottery" to its proper meaning, as applied to a specific type of case, is shown by the fact that the Wisconsin Constitution (Art. IV, § 24) contains the following clear and absolute prohibition: "The legislature shall never authorize any lottery, * * *".

**"Section 1305. The provisions of this chapter shall not apply with respect to any fishing contest not conducted for profit wherein prizes are awarded for the specie, size, weight, or quality of fish caught by contestants in any bona fide fishing or recreational event."

****Cf.* the rule prevailing under the English cases that "The distribution must depend wholly upon chance, and if the exercise of skill on the part of the competitors can, and does, contribute to success, the scheme is not a lottery, although chance may play a part in it." XV Halsbury's *Laws of England*, pp. 526-7 (citing and explaining the applicable English authorities).

but also expressed its judgment "that Congress, in enacting the lottery laws, never envisaged their application to such innocent pastimes as the typical fishing contest, which has a solid basis of respectability and wholesomeness removed from the reprehensible type of gambling activity which it was paramount in the Congressional mind to forbid."

It is common experience that fishing contests are not conducted by their promoters for eleemosynary purposes, but to bring people to summer resorts and fishing resorts and stimulate the business of the local hotels and stores. As the House Committee put it, such contests serve "the laudable aims of advertising the natural recreational advantages of the particular area, of attracting tourist trade to that area, and of promoting innocent community pleasure." The Commission in its brief lays stress upon the provision of § 1305 which limits the exception to fishing contests *not conducted for profit*. In the context of the Commission's argument, the implication is that if the promoters of the contest were to profit indirectly by an increase of business during the contest, and a later increase from the advertising of their resort, the fishing contest would not be within the exempting statute. But the Congressional Committees showed exactly what they had in mind in confining the exemption to contests not conducted for profit. They said (at p. 3011):

> "We have in mind a self-liquidating type of undertaking, whose receipts are fully consumed in defraying the actual costs of operation and are not intended or used for any other collateral objects, no matter how benevolent or worthy."

Obviously the two Congressional Committees did not have any idea that under the lottery laws, construed as the

Commission says they should be, the fishermen who entered a contest suffered a detriment, which was sufficient consideration to make the contest a lottery if it was of benefit, as no doubt it would be, to the stores where the fishermen got their bait and such equipment as they might need, the hotels where they stayed, the service stations where they purchased their gasoline and the shops where they bought post cards and souvenirs for their families.

The Commission is before this Court asking for so broad a construction of § 1304 of the Criminal Code that it would be impossible to visualize the great variety of situations, heretofore thought not to involve wrongdoing, that it might bring within the scope of the lottery statutes. It is asking the Court to put that construction on the statutes without having before it any *evidence* as to the possible consequences of such a construction, or any *evidence* that radio give-away contests have any harmful effect on the public, and in spite of the following facts:

1. No case in the federal courts has ever adopted the construction that the Commission urges, or anything resembling it; and, so far as we know, no prosecution under the lottery laws on any such theory has ever been commenced.

2. The Department of Justice has refused to proceed against the type of programs to which the Commission now objects. For details as to various requests to prosecute made by the Commission and refusals to prosecute by the Department of Justice, see pars. 9-14 of the affidavit of G. B. Zorbaugh (R. 15) and the exhibits annexed thereto marked E-1 to J-2 (R. 30-63).

3. The Commission itself conceded in 1943 that it did not have power to proceed against give-away contests under the present statutes, and asked Congress to amend the statutes; but Congress did not do it. See Zorbaugh affidavit, par. 8 (R. 14) and Exhibit D (R. 27)—the letter from the Chairman of the Commission to the Chairman of the Interstate Commerce Committee of the Senate asking that the statute be amended and enclosing a suggested amendment (R. 30).

4. The *only* prior court decision on the question of whether a give-away contest violated the lottery laws held that it did not. *Clef, Inc.* v. *Peoria Broadcasting Co.* (C. C. Peoria County, Ill. 1939), an unreported opinion. See Zorbaugh affidavit, par. 4 (R. 13) and the complaint and opinion in that case, which are in Exhibit A to the affidavit (R. 16-23).

5. The rulings of the Solicitor of the Post Office Department under the postal lottery law are opposed to the interpretation of § 1304 that the Commission advocates. For rulings on the mailability of material relating to radio give-away programs, see pars. 5-7 of the Zorbaugh affidavit (R. 13-5) and Exhibits B-1 to C-2 thereto (R. 24-7). The rulings include one which is specifically addressed to appellee's program "Stop the Music", and is to the effect that material relating to it would not be regarded by the Post Office as "non-mailable under the postal lottery statute" (R. 27).

POINT II.

RULES (b)(2), (3) AND (4) ARE IN VIOLATION OF SECTIONS 307 (a) AND 309 (a) OF THE COMMUNICATIONS ACT, WHICH REQUIRE THE COMMISSION TO GRANT OR WITHOLD STATION LICENSES SOLELY ACCORDING TO THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY.

Congress has given the Commission but a single test to use in granting or withholding licenses or renewals of licenses for broadcasting stations. Under Sections 307(a) and 309(a) of the Communications Act, quoted in Appendix A, that test is "public interest, convenience and necessity."

In *Waite* v. *Macy*, 246 U. S. 606, 609-10, this Court pointed out, in a somewhat different situation involving standards of purity for tea, that under a statute charging an administrative body with the duty of determining "the fitness for consumption" of imported tea, one kind of impurity could not "be picked out and accorded supremacy in evil by an absolute rule irrespective of any harm that it may do." In the District Court we argued by analogy that it was improper for the Commission to isolate the single factor of violation of the lottery laws and accord that factor supremacy in evil, without regard to any of the other considerations affecting public interest, convenience and necessity. The Commission replied to our argument by urging that "The public interest would be an empty concept if an applicant who proposes to violate the law through a practice of broadcasting lotteries could successfully demand a license for that purpose (sic) merely because his other programs will be legal or even highly desirable."*

*Reply Brief in the District Court, p. 11.

If everything that can be construed as a lottery were a heinous offense, essentially harmful to the public welfare, the Commission's answer might be plausible. But when the statute is susceptible to the kind of interpretation that it received from the Post Office Department in the case of fishing contests and when, according to the Commission, a lottery is present in a give-away contest if a person has to answer the telephone with a prescribed phrase which has been broadcast over another program, the reasons for an absolute rule cease to be apparent.

The Commission's argument might be more plausible also if every charge of a violation of the lottery laws was an open-and-shut case; but there will always be borderline cases where, in a prosecution under the criminal statute, it would be for the jury to find the facts which determine whether the game is one of chance and whether consideration has in fact been paid by those who participate. *Cf. Commonwealth* v. *Wall, supra,* and *Commonwealth* v. *Heffner, supra.*

Broadcast station licenses are valuable properties, and persons holding them will not, we think, either jeopardize their standing as broadcasters, or take the risk of prosecution for a crime, by broadcasting what they know is a lottery. The cases that will come up will be cases where there is a difference of opinion between the broadcaster and the Commission as to whether the program in fact constitutes a lottery.

A practical case may illustrate the undesirability, if not the absurdity, of the rule of thumb which requires the Commission to deny licenses when it finds that the station has been broadcasting or intends to broadcast a program that it may consider a lottery. We are informed that in the

vicinity of Boston there is an FM station, established by the Lowell Institute and operated by it in conjunction with a number of educational institutions, including Harvard University, Radcliffe College, Massachusetts Institute of Technology and others. Its primary purpose is to give the people of the Boston area the very finest reproduction of the finest music, as well as certain educational programs. Another purpose, we are informed, is to permit the radio and acoustical scientists of the cooperating universities to employ the station experimentally in the development of new and better devices for radio broadcasting and reception.

Let us suppose that a breakfast food company employs the facilities of the station to put on a morning program for housewives, in the nature of a prize quiz concerning the history of music and musicians; and that the questions on the quiz are based upon program notes given over the radio during the intermissions of performances of the Boston Symphony Orchestra—so that persons who want to be prepared with the correct answers, if called on the telephone, probably—perhaps certainly—will listen to the broadcasts of the Boston Symphony concerts.

If the Commission's rules are valid, the supposed program is clearly a lottery under Rule (b) (3). But would anyone with a sense of values assert that, when the license of the station comes up for renewal, the Commission by an absolute rule ought to put the station off the air, instead of following the normal process of complaining to the authorities charged with the enforcement of the lottery laws, so that the question at issue between the station and the Commission may be decided by the ordinary processes of law, rather than by administrative fiat? We submit that the question answers itself.

In the situation supposed, the Commission would be bound by its own rules to deny renewal of the license. While there are cases, such as *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223, where to protect and make effective its own powers the Commission by an absolute rule may deny a license to an offending station, the case before this Court is not that sort at all. The Commission has not been appointed by Congress as the agency charged with enforcing the lottery laws.

It is not enough to reply that the station that is denied a renewal of its license has a right to judicial review. The risk of losing its license on a construction of a disputed point of law would be too great for any broadcaster to take. See Complaint, pars. 12-15, reciting factual grounds for the claim of irreparable injury, which were admitted by the Commission and are the basis on which the injunction against Rules (b) (2), (3) and (4) was granted below (110 F. 2d at 378; R. 113).*

We submit that it is neither intelligent nor lawful administration for the Commission to isolate a single factor bearing on the issue of public interest, convenience and necessity, and to give it supremacy in evil over all others, regardless—in case of an alleged violation of § 1304—of how trivial or how unintentional the violation may be. For that reason alone it is submitted that Rules (b) (2), (3) and (4) are invalid.

The position which the Commission has taken in this case is quite contrary to that which it took in 1951 (and

*Under the statute the risk to the broadcaster is not only the denial of renewal of his license when the time for renewal comes, but also revocation of the license in the meantime, because it is expressly provided in the Communications Act, § 312(a), that the Commission may revoke a license on any ground that would be sufficient for denial of a renewal or an original application.

from which, so far as we know, it has never receded) in a proceeding before it, Docket No. 9572, entitled "In the Matter of Establishment of a uniform policy to be followed in licensing of radio broadcast stations cases in connection with violations by an applicant of laws of the U. S. other than the Communications Act of 1934, as amended." We quote from the Commission's Report in that proceeding, released March 29, 1951:*

> "9. The contention has been made by parties in the proceeding that *no blanket policy* should be adopted by the FCC which would *absolutely disqualify* applicants for radio facilities where they are found to have violated a federal law or which would attempt to specify the exact weight or significance to be given by the Commission to such violations. Such evaluations, it was argued, should be made only on a case-to-case basis in the light of the specific facts involved in and related to the violation. *We are in general agreement with this contention.* As mentioned above, the Commission must be satisfied that an applicant has the requisite qualifications to assure that public interest will be served by a grant of his application. This determination cannot be made on the basis of isolated facts *but should include a careful, critical analysis of all pertinent conduct of the applicant.* We believe, that if an applicant is or has been involved in unlawful practices, *an analysis of the substance of these practices must be made to determine their relevance and weight* as regards the ability of the applicant to use the requested radio authorization in the public interest. *We do not believe that the outcome of this determination should be prejudged by the adoption*

*We note here again that all emphasis in quotations in this brief is ours.

of any general rule forbidding any grant in all cases where unlawful conduct of any kind or degree can be shown. Nor do we believe that any rule could adequately prescribe what type of conduct may be considered of such a nature that in all cases it would be contrary to the public interest to grant a license.

* * * * *

"11. It has been urged upon us that the violation of a U. S. law per se raises no presumption adverse to an applicant. With this point of view we do not agree. Violations of Federal laws, whether deliberate or inadvertent, raise sufficient question regarding character to merit further examination. While this question as to character may be overcome by countervailing circumstances, nevertheless, in every case, the Commission must view with concern the unlawful conduct of any applicant who is seeking authority to operate radio facilities as a trustee for the public. This is not to say that a single violation of a Federal law or even a number of them necessarily makes the offender ineligible for a radio grant. There may be facts which are in extenuation of the violation of law. Or, *there may be other favorable facts and considerations that outweigh the record of unlawful conduct and qualify the applicant to operate a station in the public interest.* In all such cases, a matter of prime concern is whether the violation was committed inadvertently or wilfully. Innocent violations are not as serious as deliberate ones."

It would be an absurdity to say that there can be under other laws, but not under the lottery laws, "favorable facts and considerations that outweigh the record of unlawful conduct and qualify the applicant to operate a station in the public interest."

POINT III.

RULES (b) (2), (3) AND (4) ARE INVALID AS IMPOSING CENSORSHIP ON BROADCASTING STATIONS, CONTRARY TO THE FIRST AMENDMENT AND CONTRARY TO SECTION 326 OF THE COMMUNICATIONS ACT.

In the opinion below, the court held that Rules (b) (2), (3) and (4) were in violation of the First Amendment because they went beyond the scope of § 1304, but that, since the First Amendment "does not shield either the individual or the press, or any media for the communication of thought, from the application of criminal laws designed for the protection of the general public", Rules (a) and (b)(1) did not violate the right of free speech (110 F. Supp. at 389). The court went on to say, quite aptly, that the merits of give-away contests were not involved, because even if it could be said that "We can see nothing of any possible value to society" in those programs, "they are as much entitled to the protection of free speech as the best literature" or music, citing *Winters* v. *People,* 333 U. S. 507.

It is submitted that the censorship which the Commission has expressed its intention of imposing on give-away programs is in violation of the First Amendment. *Superior Films, Inc.* v. *Department of Education,* decided January 12, 1954, U. S. L. W. 3193.

But if that were not so, the prohibition of § 326 of the Communications Act would still be applicable. When the lower court applied to our argument under § 326 the same line of reasoning that it applied to the First Amendment question (110 F. Supp. at 384-385, R. 123), it is submitted that it was overlooking the fact that the first clause of

§ 326 is an *absolute prohibition* against *any* censorship of radio programs by the Commission. That section provides:

> "§ 326. Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

The Commission has frequently disclaimed the power to impose previous restraints on radio programs. In defining its responsibilities in connection with the granting and withholding of licenses, the Commission has laid down the principle that it is not concerned with the specific contents of any radio program, but only with the "overall program service" rendered by the station to the public. F. C. C. Blue Book Report, March 7, 1947, "Public Service Responsibilities of Broadcast Licensees", p. 11. It has argued only that § 326 does not prevent it from considering "overall program service" in determining whether to renew a station license, because it does that after the event and never imposes "previous" restraints. The following are quotations from briefs of the Commission:

> ". . . official regulation cannot be effected by requiring, as a condition precedent to the right of operation, the submission of broadcast material to, and approval by, the Commission." Brief (p. 25) in *KFKB Broadcasting Association, Inc.* v. *Federal Communications Commission,* 47 F. (2d) 670 (App. D. C. 1931).
>
> ". . . The Commission's decision does not involve any official disapproval, expressed or implied, of the

> specific content of any radio programs or types of radio programs, . . . no previous restraint in the broadcast of any program or types of programs is created by the action of the Commission in this case which would bring it within the constitutional limitations set out by the Supreme Court in *Near* v. *Minnesota,* 283 U. S. 697." Brief (p. 6) in *Simmons* v. *Federal Communications Commission,* 169 F. (2d) 670 (App. D. C. 1948).

The same disclaimer was made in testimony given by a former Chairman of the Commission, before the Senate Committee on Interstate and Foreign Commerce in 1947 on the White Bill (S. 1333), p. 58. He said that an amendment to § 326 therein proposed

> ". . . makes explicit what is now implicit, namely, that there is a distinction between censorship of radio program material, in which the Commission does not and should not indulge, and the consideration of the overall service of a station, including its program service, in determining whether a station has operated in the public interest."

The Commission favored the proposed amendment of Section 326, which by a specific proviso made clear that the Commission could consider overall programming in determining whether a licensee had operated in the public interest. The amendment which appeared in the White Bill also restated the prohibition of the first clause of Section 326 in the following words:

> "The Commission shall have no power to *censor, alter, or in any manner affect or control* the substance of any material to be broadcast by any radio broadcast station licensed pursuant to this Act, * * *"

We do not believe that the words "alter, or in any manner affect or control", add anything to the prohibition against censorship, since the word "censor" embraces them. They do suggest, however, that Senator White and his Committee were insisting, in 1947, that by no possible construction could the Commission use its licensing powers to impose previous restrictions on programs.

The Committee, in its report on S. 1333 (No. 1567, 80th Cong., 2nd Sess.), declared that "the Commission has absolutely no power of censorship over radio communications" (p. 14). With reference to the proposed amendment of § 326 it said, quoting Senator White (*ibid.* p. 15):

> "The proposed language of this section does not take away the Commission's authority to make a finding whether or not a licensee has operated in the public interest; it is, in fact, affirmed. But it also makes clear that *the Commission does not have the authority to tell a licensee directly or indirectly, what he can broadcast*, or how he should run his day-by-day business."

Rules (b)(2), (3) and (4) are not consistent with the views expressed by the Commission's then Chairman, by Senator White, and by the Senate Committee when the White Bill was under consideration. Nor are they consistent with the other views expressed by the Commission, and quoted above, with reference to its function in relation to the content of radio programs.

The Commission cannot derive its power to impose previous restraints from the fact that the programs which it proposes to interdict are, according to its view of the law, violations of "criminal laws designed for the protection of the general public." (110 F. Supp. at 389; R. 129). The

statute involved in *Near* v. *Minnesota,* 283 U. S. 697, also was aimed at acts that were violations of criminal statutes.

Nor can the power to make rules for administration of the Act—either under §4(i), where the test is that they are "necessary in the execution of its functions", or under 303(r), where the test is that they are "necessary to carry out the provisions of this Act"—override the express prohibition of §326. It is not necessary for the Commission to make rules for the enforcement of §1304, since that is the function of the Department of Justice and, if the broadcaster uses the mails in promoting the alleged lottery, the function of the Postmaster General to the extent of the power given to him under the postal laws (39 U. S. C. § 259). Nor is there any other provision of the Act that makes it necessary for the Commission to impose previous restraints on programs alleged to be lotteries.

Section 1304 provides its own penalties. It provides, we submit, all the penalties that Congress intended to establish for the offense therein defined. The penalties are heavy—up to $1,000 fine and one year imprisonment for each day on which a broadcaster violates the Section. We contend that the Commission does not have the power to add to those penalties—which may be imposed only "upon conviction"—a previous restraint on the broadcaster's programs or, in the alternative, the loss of his license and consequent destruction of his business.

Had the Congress intended to give the Commission the power to enforce the lottery law, or any other law, by imposing a previous restraint on the use of a radio channel for broadcasting, it could readily have done so in specific terms, and in the light of a long and familiar precedent; for since 1872 the postal laws have conferred on the Post-

master General the power to impose a previous restraint on the use of the mails for lotteries and other gambling schemes. *Public Clearing House* v. *Coyne,* 194 U. S. 497; 39 U. S. C. §§ 259, 732. Congress has never conferred upon the Federal Communications Commission any power comparable to that possessed by the Postmaster General under the postal laws.

The failure to confer that power, combined with the clear prohibition contained in § 326, justifies the conclusion that Congress did not intend to vest in the Commission any power to censor radio programs—and certainly not a power to interdict in advance, by a series of sweeping general rules, a broad category of programs, upon pain of loss of the offending broadcaster's license.

Radio is entitled to all the protections of the First Amendment. *Superior Films, Inc.* v. *Department of Education, supra.* In addition, it is entitled to the protection of the specific prohibition of § 326. Rules (b)(2), (3) and (4) are a violation of both the First Amendment and § 326 of the Act.

POINT IV.

FAILURE OF APPELLEE TO APPEAL FROM THE JUDGMENT SUSTAINING RULES (a) AND (b)(1) DOES NOT PRECLUDE IT FROM RAISING THE ARGUMENTS SET FORTH UNDER POINTS II AND III.

The Commission in its brief (at pp. 19-20) takes the view that certain broad issues which we raised and argued in the lower court cannot be raised in this Court, because of our failure to appeal from the unanimous opinion of the lower court sustaining the Commission's view of those

issues. We agree, of course, that we cannot ask this Court to enlarge the judgment in our favor, and that injunctive relief against paragraphs (a) and (b)(1) is no longer available to us.

We contend, however, that we are entitled to urge upon this Court any and every ground for the invalidity of Rules (b)(2), (3) and (4), even though the same arguments might invalidate Rules (a) and (b)(1), if their validity were before the Court.

Appellee did not appeal from the judgment sustaining Rules (a) and (b)(1), because they do not apply to *any* of its programs. Not because of the Rules, but because of the statutory law, appellee has never broadcast and does not intend to broadcast any program that is within, or might reasonably be held to fall within, the description of Rule (a), now that its definition of a lottery has been restricted by the invalidation of Rules (b)(2), (3) and (4). Nor has appellee, so far as we know, ever broadcast any program falling within the description of Rule (b)(1); and appellee does not have any present intention to broadcast any such programs in the future.

Before the District Court we attacked the Rules as a whole, though our objection to subdivision (1) of Rule (b) was limited to a matter of wording which might permit the Rule to be construed too broadly. We attacked Rule (a) because the word "lottery", as therein used, imported the specific definitions of Rules (b)(1) to (4). But once the District Court had stricken Rules (b)(2), (3) and (4), Rule (a) was limited to a description of the offense in the words of the statute, qualified only by Rule (b)(1). The result was that the decision of the District Court left us in a position where we could no longer maintain that we

would suffer irreparable injury from the enforcement of Rules (a) and (b)(1), not having, or being likely to have, any programs falling within those Rules as construed by the District Court.

It did not seem appropriate, therefore, to appeal from the judgment of the District Court sustaining Rules (a) and (b)(1), even assuming that we had the right to appeal from provisions of a judgment with respect to which we could not make out a showing of irreparable injury, which is at best a doubtful question. *Cf. Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593; and see *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324.

As we read the authorities, we have in this Court the right to urge against Rules (b)(2) to (4) any and every matter appearing in the record, or justified by the decided cases, including matters that might also be addressed to Rules (a) and (b)(1) if they were before the Court.* *Le Tulle* v. *Scofield, Collector of Internal Revenue*, 308 U. S. 415 (1940) and the authorities which it cites establish our right in that regard. There the Collector had assessed a tax on the ground that a series of transactions, involving transfers to a corporation of property of an individual and property of another corporation controlled by him, was not a tax free reorganization, and that the individual was therefore taxable as on a sale or exchange. The taxpayer sued for a refund and the District Court decided for the taxpayer, holding that the reorganization was tax free, so that no

*". . . it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *U. S.* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435.

gain or loss could have been realized by him. The Collector appealed. The Court of Appeals reversed in part, holding that there was a tax free reorganization in respect of the properties that came from the corporation but not in respect of the properties that came from the individual; hence that he was taxable on gain realized on the latter group of properties.

The taxpayer obtained a writ of certiorari but the Collector did not apply for certiorari. Thus the issue before this Court was only whether there was a tax free reorganization in respect of the properties that came to the acquiring company from the individual taxpayer.

Before this Court the Collector argued that, because the taxpayer had come out of the series of transactions with only bonds and cash, and without any equity interest in the acquiring company, there was no tax free reorganization at all, with respect to either group of properties that had been transferred. Thus the Collector's argument—insofar as the corporate properties were concerned—was contrary to the decision of the Court of Appeals from which he had failed to appeal. This Court said that the judgment as modified by the Court of Appeals could not be enlarged to impose any additional tax on the plaintiff; but nevertheless it accepted the Collector's argument and decided the case on that basis, holding that there was no tax free reorganization at all, and noting that, if the Collector had appealed, the liability of the taxpayer would have been much larger. Upholding the right of the Collector to make the broad argument that he had made, in spite of his failure to appeal from the decision of the Court of Appeals, the Court laid down the applicable rule as follows (at pp. 421-22):

> "A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him."

We submit that *Le Tulle* v. *Scofield* and the cases which it cites clearly establish our right to assert, in support of the judgment holding Rules (b)(2), (3) and (4) invalid, any ground that the record and the authorities justify, even though the same grounds might equally invalidate Rules (a) and (b)(1) if we had appealed and the Court were to sustain the appeal despite the fact that Rules (a) and (b)(1), if properly construed, do not affect appellee.

CONCLUSION

Rules (b)(2), (3) and (4) are based upon a construction of § 1304 of the Criminal Code for which there is no justification in either reason or authority, and which would have the effect of extending the federal lottery laws to cases that have never been considered to be within the mischief of the laws against gambling. The construction of § 1304 of the Criminal Code that the Commission urges is contrary to the construction that has been put upon the lottery statutes by all of the courts and the agencies charged with enforcement of the lottery laws.

The action of the Commission in setting up an absolute test, that disregards all other factors bearing on the public interest, convenience and necessity, and makes one single factor determinative of whether a broadcaster shall have

a license, is not only unsound and unintelligent administration of the statute but is contrary to its specific terms.

Rules (b)(2), (3) and (4) impose a form of censorship of radio programs, and constitute a previous restraint on speech of the most sweeping character, contrary not only to the First Amendment but to the specific prohibition contained in § 326 of the Communications Act.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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BLEED THROUGH-

APPENDIX A

Relevant sections of the Communications Act of 1934, as amended (48 Stat. 1064 *et seq.*; 50 Stat. 189; 66 Stat. 715; 47 U. S. C. § 151 *et seq.*):

SECTION 4(i):

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

SECTION 303(r):

Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

SECTION 307(a):

The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

SECTION 308(b):

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of

the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

SECTION 309(a):

If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.